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No. 293

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12,117.

THE NATIONAL DRYING MACHINERY CO.

vs.

JACK ACKOFF

and

NATIONAL DRYER MFG. CORP.

and

NATIONAL DRYER SALES CORPORATION (World Dryer Corporation, successor in interest substituted)

vs.

THE NATIONAL DRYING MACHINERY CO., NATIONAL DRYER MFG. CORP. and NATIONAL DRYER SALES CORPORATION (World Dryer Corporation, Successor in interest substituted),

Appellants.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (CIVIL ACTION No. 16,518).

Appendix for Appellants

JOSEPH SMUKLER,
DANIEL LOWENTHAL,
NOCHEM S. WINNET,
FOX, ROTHSCHILD, O'BRIEN & FRANKEL,
1732 Bankers Securities Bldg.,
Philadelphia 7, Pennsylvania,
Attorneys for Appellants.

Note

Many pages have not been accounted for, and apparently have been omitted in the printing of this brief.

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DOCKET ENTRIES.

April 27, 1955. Final Decree in favor of defendant and granting an injunction against plaintiff, etc. filed 4-28-55 noted and notice mailed.

April 27, 1955. Plaintiff's motion for an amendment to the Final Decree filed and Order staying injunction pending disposition of motion filed, 4-28-55, noted and notice filed.

May 2, 1955. Argued our Motion to amend Decree.

May 10, 1955. Opinion, Kirkpatrick, Ch. J. amending Final Decree filed April 27, 1955, filed.

May 11, 1955. Plaintiff's notice of appeal filed 5-12-55, copy to L. Necho.

May 11, 1955. Clerk's copy of notice to U. S. Ct. of Appeals filed.

May 12, 1955. Plaintiff's motion to stay injunction pending disposition of plaintiff's appeal from Final Decree and Order of Court granting motion and directing defendant to enter a supersedeas bond in the sum of $20,000.00 filed. Noted and notice mailed 5-13-55.

May 23, 1955. Stipulation of counsel as to timely motion for assessment of counsel fee; and as to additional findings of fact and order approving same filed.

May 23, 1955 Defendant's notice of appeal filed 5-24-55, copy to Daniel Mungall.

May 23, 1955. Supersedeas bond of plaintiff-appellant in the sum of $20,000.00 with National Surety Corp. as surety and order approving same filed.

May 23, 1955. Clerk's copy of Notice to U. S. Ct. of Appeals filed.

June 6, 1955. Record transmitted to U. S. Ct. of Appeals.

April 27, 1956. Mandate affirming judgment of this court in favor of plaintiff's received from U. S. Ct. of Appeals and filed.

April 27, 1956. Mandate affirming judgment of this Court in favor of defendant received from U. S. Ct. of Appeals and filed.

May 14, 1956. Writ of Injunction exit.

May 23, 1956. Plaintiff's motion for an Order reducing supersedeas bond entered in $20,000.00 to $2,000.00 filed 5-24-56. Noted and Notice mailed.

July 20, 1956. Bill of costs of National Drying Machinery Co. filed.

August 22, 1956. Petition for an Order to show cause why plaintiff should not be adjudged in contempt filed. Returnable 9-14-56 at 10:00 A. M. (Filed in No. 15589).

August 25, 1956. Plaintiffs request for admissions of fact and genuineness of documents, filed (No. 15589).

August 31, 1956. Appearance of F. R. O. & F., Esqs., for World Dryer Corp. (formerly The National Dryer Mfg. Co.) filed (filed in No. 15589).

September 14, 1956. Argued sur motion to adjudge National Dryer Mfg. Co. in contempt.

September 21, 1956. Transcript of hearing of 9-14-56 filed (No. 15589).

September 26, 1956. Opinion, Kirkpatrick, Ch. J. finding National Dryer Sales Corp. and National Dryer Mfg. Corp. guilty of contempt and ordering payment of fine in $5000.00, together with costs and attorneys' fee of $1000.00 filed (Order to be submitted) C. C. A. No. 15589).

November 5, 1956. Stipulation re. Petition for civil contempt, filed (No. 15589).

November 5, 1956. Opinion, Kirkpatrick, Ch. J. re reargument, filed.

November 13, 1956. Order of counsel to mark judgment for costs entered on Decree of 4-27-55 satisfied, filed.

Docket Entries

November 19, 1956. In accordance with Order filed, the judgment for costs entered on Decree of 4-27-55 is marked "satisfied" attest /s/ Robert F. Criswell, Deputy Clerk.

November 20, 1956. Order finding National Dryer Sales Corp. and National Dryer Mfg. Corp. guilty of contempt and ordering payment of fine in $5000.00, together with costs and attorneys' fee of $1000.00 filed, noted and notice mailed 11-21-56 (See C. A. No. 15589).

November 26, 1956. Notice of appeal by defendant filed, copy to Louis Necho, Esq. (See C. A. 15589).

November 26, 1956. Copy of Clerk's notice to U. S. Ct. of Appeals, filed (See C. A. 15589).

November 27, 1956. Supersedeas bond on appeal in $10,000.00 with National Surety Corporation as surety and Order affirming same filed (C. A. No. 15589) noted and notice mailed 11-28-56.

FINAL DECREE.

(In Appeals Nos. 11,639 and 11,640.)

(Civil Action No. 16,518.)

The above entitled cause having come on to be heard on November 30 and December 1, 1954, before this Court sitting at Easton, Pa., and having been argued on December 4, 1954, before this Court sitting at Philadelphia, Pa., and on findings of fact and conclusions of law submitted by both sides,

IT IS HEREBY ADJUDGED, ORDERED and DECREED as follows:

1. Defendant is the sole owner of National as a trade mark for drying machines.

2. Trade mark registration No. 556,551 of March 25, 1952 is valid and is the sole property of the Defendant.

3. Plaintiff infringed Defendant's statutory and common law rights.

4. The Complaint is hereby dismissed with prejudice.

5. Plaintiff's, their officers, agents, servants, employes and distributors, and all their successors in interest are hereby perpetually enjoined from directly or indirectly selling or in any way making or dealing in drying machines under the trade mark National or under a business name which includes the word National.

6. The Defendant has the right to sell hand dryers under its trade mark National and under a business name which includes the word National.

7. The plaintiffs are ordered to pay to the Defendant the costs of this suit.

8. The Plaintiffs are ordered to pay to the Defendant all their profits from the sale of drying machines from January 1950 to date.

9. This cause is hereby referred to take and state an accounting as to the profits of the Plaintiffs.

/s/ KIRKPATRICK,
Ch. J.

April 27, 1955.

OPINION SUR MOTION TO MODIFY DECREE.

(In Appeal No. 11,640.)

(Civil Action No. 16,518.)

Before Kirkpatrick, Ch. J.

The Lanham Act, 15 U. S. C. 1117, provides that the right to recover profits against a trademark infringer shall be "subject to the principles of equity". It seems to be definitely settled since Champion Spark Plug Co. v. Sanders, 331 U. S. 125, that an accounting for profits does not automatically follow a judgment of infringement. The "principles of equity" give the Court a very wide discretion and, as appears from the opinion in the case cited, the Court may

base its discretion upon a wide range of considerations. Thus, in that case the Court pointed out that there had been no showing of fraud or palming off, that the respondents had for several years apparently tried to comply with a cease and desist order of the Federal Trade Commission which would have eliminated any possible imposition upon the public as to the secondhand character of the goods, and that the likelihood of damage to the petitioner or profit to the respondents seemed slight. Thus, not only the probabilities as to the existence of profits and damages were considered but also the nature of the infringement, the absence of fraudulent intent and what was done by the respondents in order to avoid misleading the public.

It is true that in Century Distilling Co. v. Continental Distilling Corp., 205 F. 2d 140, Judge Maris ordered an accounting upon a finding of infringement, without discussing the question whether there were any profits or damages to be accounted for or whether the equities of the case demanded it. It is possible that he did so on the theory that accounting would follow automatically upon the decree. However, in the Century case there was a definite finding by the Court of the existence of competition between the two products involved, a finding which almost postulated damages, if not profits, and which would give a basis for the exercise of the Court's discretion to grant an accounting.

In the present case the products are not the same and there is no competition between them. The injunction was granted to protect the counterclaimant against competition by the plaintiff, presently nonexistent, but which would arise if and when the counterclaimant should decide to enter upon a field closely related to that in which it was doing business, but in which it had not made or sold a single article.

I am of the opinion that the injunction is all that is needed in order to give the counterclaimant in the present case complete relief and, further, that the principles of

equity would not justify me in awarding an accounting for profits (there having been no proof whatever of any damages) in the sale of goods which the counterclaimant has never manufactured or sold. To allow the counterclaimant the accounting for which it asks would be in effect to allow it the profits from an extensive business in which it had never invested a cent of money or taken any risk. To say the least, such an order would be a windfall.

The final decree entered in this matter is amended by striking out "The plaintiffs are ordered to pay to the defendant all their profits from the sale of drying machines from January, 1950, to date."

STIPULATION.

It is hereby stipulated by the parties to the above entitled cause that the record shall show that Defendant made a timely motion for assessment of Counsel fee against the Plaintiffs and that said motion was denied.

It is further stipulated that the Trial Judge, upon timely motion by the Plaintiffs, made the following additional findings of fact:

(a) There is no competition between the Machinery Company and the Manufacturing and Sales Companies

(b) The Manufacturing Company, the Sales Company and Ackoff did not at any time attempt to palm off the electric hand dryer as the product of the Machinery Company.

/s/ DANIEL MUNGALL, JR.,
Counsel for Plaintiffs,

/s/ LOUIS NECHO,
Counsel for Defendant,

KIRKPATRICK,
U. S. D. C. Ch. J.

Approved May 23, 1955.

PETITION FOR ISSUANCE OF RULE TO SHOW CAUSE AND FOR CIVIL CONTEMPT JUDGMENT.

To the Honorable, the Judges of the above entitled Court:

The Petition of The National Drying Machinery Company respectfully represents:

1. That it is the Plaintiff in this proceeding and that National Dryer Manufacturing Corporation and National Dryer Sales Corporation (World Dryer Corporation, successor in interest, substituted) are, jointly and severally, the Defendants in this proceeding.

2. That Plaintiff herein was the Plaintiff in Civil Action No. 15,589 and was the Defendant in Civil Action No. 16518.

3 That both of said actions were consolidated and tried together on November 30 and December 1st, 1954, in the United States District Court sitting at Easton, Pennsylvania, the Honorable William H. Kirkpatrick, Ch. J. presiding.

4. That on April 27, 1956, this Court entered a Decree whereby National Dryer Manufacturing Corporation and National Dryer Sales Corporation "their officers, agents, servants, employees and distributors and all their successors in interest" were perpetually "enjoined from directly or indirectly selling, or in any way making, or dealing in, drying machines under the trademark National or under a business name which includes the word National.

5. That said Decree, in paragraph 8 thereof, also ordered Defendants herein to pay to Plaintiff herein "all their profits

from the sale of drying machines from January 1950 to date."

6. That Defendants herein filed a Motion to Modify said Decree and that the said Decree was modified by striking the said paragraph 8 therefrom.

7. That Plaintiff herein moved for a reasonable Counsel and that said motion was denied.

8. That Defendants herein appealed the said Decree, as modified, and that the Court of Appeals affirmed the judgment and Decree of the District Court in toto.

9. That Defendants herein petitioned the Supreme Court of the United States for a writ of certiorari and that said Petition was denied.

10. That on April 27, 1956, the Court of Appeals issued its mandate to the Clerk of the District Court by virtue of which the injunction issued by the District Court became final and in full force.

11. That on May 24, 1956, a copy of the Decree and a copy of the injunction in Action No. 16518 were duly served, by the U. S. Marshal's returns A and B, which are hereto annexed respectively.

12. That on, or about, June 4, 1956 Defendants wrote a letter, the original of which is hereto annexed as Ex. C, in which the word "National" is used twice as part of the business name and is used several times as a trademark for the drying machines of Defendants.

13. That accompanying said letter, Ex. C, there were four sheets of testimonials which are hereto annexed as Ex. D-1, D-2, D-3 and D-4.

14. That on or about July 7, 1956, the Defendants herein mailed a communication to Copley classics of Springfield, Mass. in an envelope which is duly stamped by the United States Post Office and which is hereto annexed as Ex. E.

15. That on or about April 26, 1956, the name National Dryer Sales Corporation, one of the Defendants herein, was changed in the office of the Secretary of State of the State of Illinois to World Dryer Corporation by virtue of which National Dryer Sales Corporation ceased to exist and therefore the letter written on June 4, 1956, Ex. C, was fraudulent in addition to being in disobedience of the injunction of this Court.

16. That Defendants in various magazines as per examples hereto annexed as Ex. F-1; F-2, and F-3 all of which show the use of the word National in connection with the word "formerly", which implies that the equity with which National was previously associated is out of existence.

17. That on or about July 30, 1956, the M. B. Long Co. of Pittsburgh, Pennsylvania, a distributor of Defendants, mailed a letter which is hereto annexed as Ex. G-1.

18. That accompanying said letter, Ex. G-1 there were: a testimonial letter dated January 25, 1955, and three pieces of literature which are hereto annexed as Ex. G-2, G-3, G-4 and G-5.

Petition for Issuance of Rule to Show Cause and for Civil Contempt Judgment

19. That on or about July 23, 1956, Defendants wrote a letter to Mr. J. Greenberg, which letter and the envelope in which it was mailed are hereto annexed as Ex. H-1 and H-2.

20. That on, or about, July 24 and July 31, 1956 Defendants wrote letters to U. O. Cumming in New York, which letter and the envelopes in which they were mailed are hereto attached as Ex. K-1, K-2, K-3 and K-4.

21. That the foregoing acts constitute repeated and deliberate disobedience of the injunction issued under the seal of this Court and duly served on Defendants.

Wherefore Petitioner prays this Court for a Rule to show cause why Defendants should not be adjudged as being in Civil Contempt and, upon return of said Rule, to adjudge them in contempt and to order them to purge themselves of said contempt by paying to Plaintiff a fine with all costs of this proceeding and a reasonable attorney's fee.

Respectfully submitted,

LOUIS NECHO,
Counsel for Plaintiff.

Exhibit "C"

EXHIBIT "C".

NATIONAL DRYER | sales corporation
616 W. Adams Street, Chicago 6, Ill.-Dearborn 2-0348

June 4, 1956

Mr. Daniel Pollack
Copley Classics, Inc.
29 Worthington Street
Springfield 3, Massachusetts

Dear Mr. Pollack:

We appreciate your inquiry regarding National Dryers, and are pleased to enclose descriptive literature on our product.

The back page of the green circular gives you a complete analysis of the comparative costs of National Dryers versus towels, and will emphasize the substantial dollar savings made possible by the installation of this equipment. In addition, National Dryers eliminate unsightly and unsanitary washroom conditions, and reduce handling and maintenance costs.

National Dryers' proven superiority of performance provides you with the fastest, most economical drying service available. The enclosed testimonial letters offer concrete evidence of these benefits.

National Dryers are priced at $142.50 per unit, with discounts, depending upon quantities purchased. Prices are F. O. B. Chicago, Illinois, and deliveries can be made promptly upon receipt of orders.

National Dryers are unconditionally guaranteed for two (2) years against any defective parts or material.

Exhibit "C"

If you have any questions regarding our product, please do not hesitate to communicate with us. We are most anxious to cooperate with you in any manner possible.

Thank you again for your interest in our product. We shall look forward to receiving your valued order.

Yours very truly,
NATIONAL DRYER SALES CORP.
S. M. Becker, Jr.
S. Max Becker, Jr.
President

SMB:jc—Encls.

EXHIBIT "D-2"

BOSTONIAN SHOES
Commonwealth Shoe & Leather Co., Whitman,
Massachusetts

May 15, 1953

Mr. Theodore R. Ruwitch
National Dryer Sales Corporation
616 W. Adams Street
Chicago 6, Illinois

Dear Mr. Ruwitch:

With reference to your letter of May 4, we have had your Electric Hand Dryers in our new Gardiner, Maine plant for some time.

We are pleased to advise that we feel these dryers have served in a very satisfactory manner. There is very little question in our minds that the savings that have been made in paper towel costs will more than offset the expense of installing and operating these dryers. Of course, it goes without saying that they eliminate one of the more troublesome nuisances that a Maintenance Department has in a plant such as ours.

In addition to the above, it has been called to my attention by our Insurance Companies that these dryers minimize the danger of our employees getting skin infections which result from the handling of certain types of leathers, because this method of drying does not spread the germs as using paper towels does.

We are planning in the near future to install new washroom facilities in our plant in Whitman, Mass., and at that time would be interested in talking with you relative to making a further installation here in Whitman.

Yours very truly,
BOSTONIAN SHOES
Wm. S. Fraser, Jr.
W. S. Fraser, Jr.
Vice President

WSF JR:DG

Exhibit "D-3"

EXHIBIT "D-3".

HICKEY-FREEMAN CO.
Rochester, N. Y.

General Offices and Factory
1155 Clinton Avenue North
Rochester 1, N. Y.

New York Office
Empire State Building
350 Fifth Avenue
New York 1, N. Y.

July 1, 1954.

National Hand Dryer Sales,
Division of Sheldon Sales, Inc.,
881 Main Street,
Buffalo 3, New York.

Attn: Mr. Leroy Bergman

Dear Mr. Bergman:

The National Hand Dryer installation throughout our shops and offices has proven highly satisfactory in every way.

Washrooms remain neat and unlittered. . . .

Time is saved by having no toweling cabinets to fill. . . .

Space is saved by eliminating the necessity for storing large quantities of toweling. . . .

Maintenance is practically zero.

In all, we are very pleased with our conversion to National Hand Dryers.

Very truly yours,
HICKEY-FREEMAN CO.
HAROLD W. RAUTER
Vice President

HWR*MOB

Exhibit "D-4"

EXHIBIT "D-4".

RELIANCE MANUFACTURING COMPANY
212 West Monroe Street
Chicago 6, Illinois
September 5, 1952

Mr. S. Max Becker, Jr.
National Dryer Sales Corporation
616 W. Adams Street
Chicago, Illinois

Dear Sir:

In response to your recent inquiry for information on our experience with National Hand Dryers, we are pleased to furnish you with the following information.

In July of 1950, we made our original purchase of this equipment on a test basis for use in the washrooms of our general office building. The results of this test were satisfactory, and in October of that year we completed the installation of National Dryers throughout the building.

We found that the dryers eliminated the cost of paper towels, as well as providing cleaner and more sanitary washrooms.

Since the use of this equipment had proven satisfactory in our office building, we became interested in further adopting National Dryers in the washrooms of our various plants. The first industrial installation was made at one of our plants in Indiana in early 1951. The results there were equally satisfactory to those obtained in our Chicago Office building and, in addition to the economic and sanitary benefits, the employee reaction was and continues to be favorable.

At one of our factories in Mississippi, we had received some complaints over conditions in the washrooms. The installation of National Dryers in this particular plant was the most satisfactory means of eliminating these complaints

and providing our employees with complete drying service. Since the installation of National Dryers in our Mississippi factory, we have not been troubled with messy washroom problems.

We have gradually expanded the installation of this equipment throughout our other factories and, at the present time, have them installed in eight locations. All in all, our results with this equipment have been most satisfactory and we are pleased to recommend its use.

Yours very truly,
RELIANCE MANUFACTURING COMPANY
H. C. BAHR

Rely on Reliance
Reg. U.S. Pat. Office H. C. Bahr

EXHIBIT "E"

(WINDOW ENVELOPE)

NATIONAL DRYER
SALES CORPORATION
616 West Adams Street, Chicago 6, Ill.

(Postmarked)
10 CHICAGO
JUL 10
7 PM
1956
ILL.

(U. S. Postage)
Three Cent
Stamp
(Cancelled)

70 CROSS ST (Notation in Pencil on Envelope).

Addressed:
Sold to
Copley Classics Inc.,
29 Worthington Street
Springfield 3, Massachusetts
Shipped to
Same

Exhibit "G-1"

EXHIBIT "G-1".

MUseum 1-1131 "Proven Best by U. S. Government Test"

M. B. LONG COMPANY
Distributor—National Electric Hand Dryers
5122 Baum Boulevard
Pittsburgh 24, Pa.

July 26, 1956

Mr. Joseph Greenberg,
Hotel Gary,
17 East Broad Street,
Hazleton, Penna.

Dear Sir:

Your recent inquiry regarding electric hand dryers has been referred to us by our factory, World Dryers Corp., Chicago, Illinois.

We are pleased to enclose herewith literature descriptive of our product. Your particular attention is respectfully called to the U. S. Government Report. As you will kindly observe, after extensive tests which they conducted for their own information, the government proved WORLD (formerly "National") Dryers to be the most efficient unit on the market.

Should you desire further information, please do not hesitate to communicate with us.

We appreciate your interest, and look further to the opportunity of serving you further.

Very truly yours,
M. B. LONG COMPANY
M. B. LONG
M. B. Long

MBL:r

P. S. Price per unit is $143.25, delivered. We shall be pleased to have representative call upon you, at your request.

World's Fastest
Registered U. S. Patent Office

Exhibit "G-1" (Window Envelope)

EXHIBIT G-1 (WINDOW ENVELOPE)

M. B. LONG COMPANY
5122 Baum Boulevard
Pittsburgh 24, Pa.

(Postmarked)
PITTSBURGH, PA
(Illegible)
JY 26 10.30 PM
1956

(U. S. Postage)
Nine Cents
in Stamps
(Cancelled)

Exhibit "H-1"

EXHIBIT "H-1".

Cable Address: REKCEB
WORLD DRYER CORPORATION
(formerly "NATIONAL" Dryer) ☆
616 W. Adams St., Chicago 6, Ill. - RAndolph 6-8834

July 23, 1956

Mr. Joseph Greenberg
Hotel Gary
17 East Broad Street
Hazleton, Pennsylvania
Dear Mr. Greenberg:

Thank you for your recent inquiry regarding World (formerly "National") Hand Dryers. We appreciate your interest in our product.

The sale of World (formerly "National") Dryers in your area is handled through our distributor, the M. B. Long Company, 5122 Baum Boulevard, Pittsburgh, Pa. We are referring your inquiry to these people and are confident that you will hear from them shortly.

Thank you again for your interest. We shall look forward to serving you through our local distributor.

Yours very truly,
WORLD DRYER CORP.
(Formerly "National")
T. R. RUWITCH
Theodore R. Ruwitch
Vice President

TRR:jc
cc: M. B. Long Co.

DRIES THE HANDS OF THE WORLD . . .

Exhibits "H-2" and "K-1"

EXHIBIT "H-2".

(Envelope.)

Jul 23 1956
13 Chicago Ill. U. S. Postage 3¢
7 PM (Cancelled)

WORLD DRYER CORPORATION
(formerly "NATIONAL" Dryer) ☆
616 W. Adams St., Chicago 6, Ill.

Mr. Joseph Greenberg
Hotel Gary
17 East Broad Street
Hazleton, Pennsylvania

EXHIBIT "K-1".

Cable Address: REKCEB
WORLD DRYER CORPORATION
(formerly "NATIONAL" Dryer) ☆
616 W. Adams St., Chicago 6, Ill. - RAndolph 6-8834

July 24, 1956

Mr. U. O. Cumming, President
International Service Corporation
Eleven West Forty-Second Street
New York, New York

Re: 24501

Dear Mr. Cumming:

Thank you very much for your letter of July 20.

We do have our Dryers available for export to certain countries. Therefore, we would appreciate learning what particular country you have an interest in as far as the export of our equipment is concerned.

Exhibits "K-1" and "K-2"

Upon receipt of this information, and if it ssible for us to work with you in that area, we shall be glad to send you complete descriptive literature and price information.

We shall look forward to your prompt reply, and thank you for your interest in our product.

Yours very truly,

WORLD DRYER CORP.
(Formerly "National")
Ted.
Theodore R. Ruwitch
Vice President

TRR:jc

DRIES THE HANDS OF THE WORLD . . .

EXHIBIT "K-2".

(Envelope.)

65 Chicago Ill.
Jul 24 1956
7 PM

U. S. Postage 6¢
(Cancelled)

VIA AIR MAIL

WORLD DRYER CORPORATION
(formerly "NATIONAL" Dryer) ☆
616 W. Adams St., Chicago 6, Ill.

Mr. U. O. Cumming, President
International Service Corporation
Eleven West Forty-Second Street
New York, New York

EXHIBIT "K-3".

Cable Address: REKCEB
WORLD DRYER CORPORATION
(formerly "NATIONAL" Dryer) ☆
616 W. Adams St., Chicago 6, Ill. - RAndolph 6-8834

July 31, 1956

Mr. U. O. Cumming, President
International Service Corp.
Eleven West Forty-Second Street
New York 36, New York

Dear Mr. Cumming:

This will acknowledge with thanks your letter of July 31, and advise you that we shall be pleased to furnish you with our equipment for sale in the countries which you mentioned in your letter.

Accordingly, we are pleased to enclose descriptive literature and specification data covering our product. I am sure you will find this material self-explanatory. Additional copies of it are available to you upon request.

The list price of World (formerly "National") Dryers is $142.50 per unit for our standard 110-volt, 50-60 cycle, a.c. unit; and $149.30 per unit for our 220-volt, 50-60 cycle, single phase a.c. unit. We will allow you our full export distributors' discount of 40% from list price. This would make your cost on the 110-volt unit $85.50 per unit, f.o.b. Chicago, Illinois; and $89.50 per unit, f.o.b. Chicago, Illinois, on the 220-volt unit. An additional charge of $1.50 per unit should be added to cover complete export packing, if desired.

Terms of payment are net cash upon receipt of invoice, and shipments can be made promptly upon receipt of orders.

We trust this is the information you require, however, if

you have any questions, or desire additional data, please do not hesitate to advise us.

Yours very truly,

WORLD DRYER CORP.
(Formerly "National")
T. R. Ruwitch
Theodore R. Ruwitch
Vice President

TRR:jc - Encls.

DRIES THE HANDS OF THE WORLD . . .

EXHIBIT "K-4"

(Envelope.)

11 Chicago Ill.
Aug 1 1956 U. S. Postage 6c
7 PM (Cancelled)

WORLD DRYER CORPORATION
(formerly "NATIONAL" Dryer)☆
616 W. Adams St., Chicago 6, Ill.

Mr. U. O. Cumming, President
International Service Corp.
Eleven West Forty-Second Street
New York 36, New York

[OPINION] SUR CONTEMPT PROCEEDINGS.

The decree enjoined National Dryer Manufacturing Corporation and National Dryer Sales Corporation (hereinafter referred to as defendants) "from directly or indirectly selling or in any way making or dealing in drying machines * * * under a business name which includes the word National."

The defendants are unquestionably in contempt. Their use of the name "National Dryer" in letters to customers after the decree became final, is not denied. There might be some small excuse for that, although the defendants had plenty of time to make all the necessary arrangements to discontinue the use of the name immediately upon the decree becoming further unappealable by the Supreme Court's denial of certiorari. Far more serious is the defendants' conduct in adopting a deliberate policy which they contend is their right and which they intend to pursue until the Court rules it to be a violation of the injunction. This policy is to continue to use the word "National", not only on letterheads in correspondence and in advertising matter, but also on name plates of the drying machines which they sell in connection with their present corporate name as follows: "World Dryer Corporation, formerly 'National'." In all uses the word is prominently featured. On the name plates all the printing is in black letters except the words "Formerly National" which stand out in bright red.

The defendants' course of conduct is a violation of plain language of the decree, clearly intended to thwart its purpose. The whole purpose of the program is to continue to make use of whatever advantages they obtained from the use of the plaintiff's trade name. So far from distinguishing themselves from the plaintiff as manufacturers of their product, the literature and name plates serve to identify the two in the minds of the public. The defendants are saying to the public, particularly their former customers, in effect

"we are the same people whom you dealt with and whose products you bought under the name 'National' ". There is nothing to suggest that they are a distinct concern from the plaintiff's. The designation "World Dryer Corporation, formerly 'National' " is, if anything, more harmful to the plaintiff who uses the trademark "National Dryer" because one might quite possibly get the impression that the plaintiff had gone into reorganization or that the use of the word "National" as a trade mark had been abandoned.

The defendants urge: First, that they are not in competition with the products of the plaintiff. This is true, they are not in competition at the present time but the injunction was granted over that very defense which was strenuously urged at the trial and it is difficult to see how the defendants could have imagined that that fact entitles them to favorable consideration now. Second, the defendants assert that they have not been palming off their hand dryers as products of the plaintiff. Whether one calls it "palming off" or something else, the fact is that they were and still are appropriating a name which belongs to the plaintiff and are using it in connection with the sale of their products.

The defendants are adjudged in contempt and are ordered to pay to the plaintiff a fine in the amount of $5,000 together with all the costs of this proceeding and an attorney's fee of $1,000.

An appropriate order may be submitted.

[OPINION] SUR REARGUMENT

KIRKPATRICK, Ch. J.

In this case the Court issued its decree enjoining the defendants from selling their machines under any business name which included the word "National", the plaintiff's trademark. Thereafter, upon a showing of undisputed facts, the Court adjudged the defendants in contempt and ordered

them to pay to the plaintiff a fine in the amount of $5,000, together with costs and an attorney's fee of $1,000. The defendants now ask the Court to strike off the fine, taking the position that, inasmuch as the plaintiff has not produced evidence of monetary loss or damage to it occasioned by the defendants' violations, the Court erred in imposing it. The Court ordered a reargument upon the point.

In issuing the injunction, the Court found that there was no present competition between the parties, but injunctive relief was granted on the ground that the defendants were appropriating the plaintiff's property and that the plaintiff's right to use its trademark in a business which would compete with the defendants', when and if it desired to do so, had been invaded and its value impaired. The Court of Appeals apparently took the same view because in a per curiam opinion, 228 F. 2d 349, it affirmed the judgment, noting that there was no proof that the plaintiff had suffered damage.

Whether or not the Court has power to impose purely punitive damages, as the plaintiff contends, the decision of the Supreme Court in Leman v. Krentler-Arnold Co., 284 U. S. 448, leaves no possible doubt of the power of the Court in a civil contempt proceeding for infringement to order the defendants to pay to the plaintiff, as compensation for the invasion of its right, the amount of profits realized by the defendants from sales made in violation of the injunction, whether it be called a fine or something else. In this case the Court did not order an accounting of profits but imposed a fine intended as compensation. The amount of the fine may stand as the Court's estimate of a proper figure, representing less than the defendants' profits. If the defendants believe that it is excessive, they may, not later than ten days from the entry of this order, apply to the Court to order an accounting of profits. If no such application is made, the Court will enter an order, upon this reargument, confirming its original imposition of the fine, attorney's fee and costs.

In the original decree which enjoined the defendants, the Court refrained from making an award of damages in view of what at that time appeared to the Court to be the equities of the whole case. Since that time, however, the defendants have engaged in a course of deliberate and continued violation of the Court's injunction and the equities have been reversed.

In granting the injunction the Court said that the injunction was all that was needed to give complete relief but the Court had in mind something more than a mere piece of paper with the words of a decree printed on it. If the position taken by the defendants is correct, the Court would be without power to take any effective measures to put an end to the continued infringement. Concededly, the Court may not impose imprisonment in civil contempt proceedings except where the contempt consists in a refusal to obey a command to take some affirmative action. If a compensatory fine or an award of profits as damages cannot be imposed, the defendants could go on violating the injunction as long as they found it profitable to do so without running the risk of any penalty except, now and then, the imposition of a moderate attorney's fee and costs.* This Court will not subscribe to any such preposterous position.

An appropriate order may be submitted.

ORDER SUR CONTEMPT PROCEEDINGS.

And now, to wit, this 20th day of November, 1956, on Plaintiff's Petition for order to show cause why Defendants should not be adjudged in Civil Contempt which Petition was heard in open court on Friday, September 14, 1956, on

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* The defendants could keep these expenses down to a minimum by simply writing to the plaintiff and admitting that they were violating and agreeing to so admit of record.

brief submitted and, pursuant to the Opinion of the Court filed on September 25, 1956, and on Motion of Counsel for Defendants for reconsideration of the award made in favor of Plaintiff in said opinion of September 25, 1956, and on reargument sur said Motion, and pursuant to the opinion of the Court Sur Reargument, filed November 5, 1956, and on motion of Louis Necho, counsel for Plaintiff, it is Hereby ordered, adjudged and decreed that:

Defendants, National Dryer Manufacturing Corporation and National Dryer Sales Corporation (World Dryer Corporation, successor in interest, substituted), pay Plaintiff a fine in the total sum of $5,000.00, a counsel fee in the sum of $1,000.00 and costs of the contempt proceedings with interest at 6% from November 20th, 1956, until the said sums are paid.

KIRKPATRICK,
Chief Judge.

NOTICE OF APPEAL

Notice is hereby given that National Dryer Mfg. Corp. and National Dryer Sales Corporation (World Dryer Corporation, Successor in interest substituted), defendants above named, hereby appeal to the United States Court of Appeals for the Third Circuit, from the Order Sur Contempt Proceedings entered in these actions on November 21, 1956.

FOX, ROTHSCHILD, O'BRIEN & FRANKEL,
By .....
Attorneys for Appellants,
1732 Bankers Securities Building,
Philadelphia 7, Pennsylvania.

November 26, 1956.